

BOARD OF ZONING APPEALS

Minutes

December 17, 2002

The regular meeting of the Board of Zoning Appeals of the City of Wichita, Kansas, was held at 1:30 p.m. on December 17, 2002, in the Planning Department Conference Room, Tenth Floor of City Hall, 455 N. Main, Wichita, Kansas.

The following Board members were in attendance:

JAMES RUANE, JAMES SKELTON, ERMA MARKHAM, JOHN ROGERS,
RANDY PHILLIPS, BICKLEY FOSTER.

SHARON DICKGRAFE -- Law Department present

J. R. COX -- Office of Central Inspection present.

The following Planning Department staff members were present:

DALE MILLER Secretary,

SCOTT KNEBEL Assistant Secretary,

ROSE SIMMERING, Recording Secretary.

RUANE: Item #1, November 19, 2002 BZA meeting minutes.

PHILLIPS moves, MARKHAM seconds to approve November 19, 2002 BZA meeting minutes.

Motion Carries 6-0.

RUANE: Item #2, BZA2002-00044, Variance to reduce the building setback for Metro Meridian High School.

PHILLIPS: I am the architect for the project and have a conflict of interest. I will abstain and remove myself from Board and into the audience.

KNEBEL, Planning staff: Presents staff report and slides. Staff recommends approval, subject to conditions, in the following report:

SECRETARY'S REPORT

CASE NUMBER: BZA2002-00044

OWNER/APPLICANT: Wichita Public Schools c/o Joe Hoover

AGENT: n/a

REQUEST: Variance to reduce the building setback for Metro Meridian High School

CURRENT ZONING: "TF-3" Two-Family Residential and "LC" Limited Commercial

LOCATION: Southwest corner of Maple and Meridian (301 S. Meridian)

JURISDICTION: The Board has jurisdiction to consider the variance request under the provisions outlined in Section 2.12.590.B, Code of the City of Wichita. The Board may grant the request when all five conditions, as required by State Statutes, are found to exist.

BACKGROUND: The applicant is requesting a variance to reduce the building setback along the west property line for Metro Meridian High School. The subject property is located at the southwest corner

of Maple and Meridian (301 S. Meridian) and is zoned “TF-3” Two-Family Residential and “LC” Limited Commercial.

The zoning regulations require a 25-foot building setback along the west property line. A variance (BZA2002-00033) was previously granted to reduce the building setback along the west property line to 13’9”; however, the applicant did not realize that a proposed chiller and transformer (not shown on their previous site plan) could not be located within the building setback. Therefore, the applicant has requested another variance to reduce the building setback from 25 feet to 2 feet for the chiller and from 25 feet to 12 feet for the transformer (see attached site plan).

ADJACENT ZONING AND LAND USE:

NORTH	“TF-3” & “LC”	Single-family, vehicle repair
SOUTH	“TF-3”	Single-family
EAST	“B” & “LC”	Apartments, retail
WEST	“MF-29” & “TF-3”	Single-family

UNIQUENESS: It is the opinion of staff that this property is unique inasmuch as the property is located in area where the existing structure was constructed under zoning regulations that required approximately one-half the building setback currently required. Over the years the zoning regulations have changed to require a 25-foot building setback for the subject property; however, very few of the structures in this area provide a 25-foot building setback along Richmond.

ADJACENT PROPERTY: It is the opinion of staff that the granting of the variance requested would not adversely affect the rights of adjacent property owners, inasmuch as the chiller and transformer would be internal to the subject property. Additionally, the chiller and transformer are of a much smaller scale than the existing building on the site and would be screened from adjacent properties by fences and landscaping.

HARDSHIP: It is the opinion of staff that the strict application of the provisions of the Zoning Code constitutes an unnecessary hardship upon the applicant, inasmuch as the only logical location of the chiller and transformer is west of the existing building because existing mechanical infrastructure is located within the building adjacent to the proposed locations for the chiller and transformer.

PUBLIC INTEREST: It is the opinion of staff that the requested variance would not adversely affect the public interest, inasmuch as there will be no encroachments into public utility easements or street right-of-way as a result of this reduction of the building setback and therefore there will be no effect on the general public.

SPIRIT AND INTENT: It is the opinion of staff that the granting of the variance requested would not be opposed to the general spirit and intent of the zoning regulations, inasmuch as the reduced setback will continue to provide for fire protection, separation, light and air circulation, and pedestrian access.

RECOMMENDATION: Should the Board determine that conditions necessary to grant the variance exist, then it is the recommendation of the Secretary that the variance to reduce the building setback along the west property line feet be GRANTED, subject to the following conditions:

1. The site shall be developed and required to comply with all building, zoning, screening, and landscape code requirements, except that the building setback shall be reduced from 25’ to 2’ along the west property line for the “Proposed New Chiller” and from 25’ to 12’ along the west property line for the “Proposed New Transformer.” This setback reduction shall apply

- only to the improvements shown on the site plan approved by the Board of Zoning Appeals. The site shall be developed in general conformance with said site plan.
2. The applicant shall obtain all local permits necessary to construct the indicated improvements, and all improvements shall be completed within one year following the BZA approval of the variance unless such time period is extended by the BZA.
 3. The resolution authorizing this variance may be declared null and void upon findings by the Board that the applicant has failed to comply with any of the foregoing conditions.
 4. Approval of this Variance shall supersede and render null and void the Variance granted for the subject property by BZA Resolution No. 2002-00033.

FOSTER: On the proposed transformer is this a ground transformer?

JOE HOOVER, agent for Wichita Public Schools: Yes, it is a ground transformer.

FOSTER: This is right next to a sidewalk? This will be self-enclosed?

HOOVER: Yes, like you would see in a residential development. It would be on a pad and be enclosed. It is for stepping down the voltage for the school. The chiller and transformer are of a much smaller scale than the existing building on the site and would be screened from adjacent properties by fences and landscaping.

FOSTER MOVES ROGERS SECONDS THAT THE BOARD ACCEPT THE FINDINGS OF FACT AS SET FORTH IN THE SECRETARY'S REPORT; AND THAT ALL FIVE CONDITIONS SET OUT IN SECTION 2.12.590(b) OF THE CITY CODE AS NECESSARY FOR THE GRANTING OF A VARIANCE HAVE BEEN FOUND TO EXIST AND THAT THE VARIANCE BE GRANTED SUBJECT TO THE CONDITIONS SET OUT IN THE SECRETARY'S REPORT FOR BZA2002-44.

MOTION carries 5-0-1, with Phillips abstaining, and the Board adopts the following resolution:

BZA RESOLUTION NO. 2002-00044

WHEREAS, Wichita Public Schools (applicant, owner) c/o Joe Hoover (agent) pursuant to Section 2.12.590.B, Code of the City of Wichita, requests a variance to Section III-B.6.d.(3) of the Unified Zoning Code to reduce the building setback for Metro Meridian High School on property zoned "TF-3" Two-Family Residential and "LC" Limited Commercial and legally described as follows:

Even Lots 286 through 308, inclusive, and the North 20 feet of Lot 310, on Phillips, now Richmond AND Odd Lots 447 through 469, inclusive and the North 20 feet of Lot 471, on Meridian, Martinson's 5th Addition to Wichita, Kansas, Sedgwick County, Kansas. Generally located at the southwest corner of Maple and Meridian (301 S. Meridian).

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of December 17, 2002, consider said application; and

WHEREAS, the Board of Zoning Appeals has proper jurisdiction to consider said request for a variance under the provisions of Section 2.12.590.B, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has found that the variance arises from such condition which is unique. It is the opinion of the Board that this property is unique inasmuch as the property is located in area where the existing structure was constructed under zoning regulations that required approximately one-half the building setback currently required. Over the years the zoning regulations have changed to require a 25-foot building setback for the subject property; however, very few of the structures in this area provide a 25-foot building setback along Richmond.

WHEREAS, the Board of Zoning Appeals has found that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents. It is the opinion of the Board that the granting of the variance requested would not adversely affect the rights of adjacent property owners, inasmuch as the chiller and transformer would be internal to the subject property. Additionally, the chiller and transformer are of a much smaller scale than the existing building on the site and would be screened from adjacent properties by fences and landscaping.

WHEREAS, the Board of Zoning Appeals has found that the strict application of the provisions of the zoning ordinance of which variance is requested will constitute unnecessary hardship upon the property owners represented in the application. It is the opinion of the Board that the strict application of the provisions of the Zoning Code constitutes an unnecessary hardship upon the applicant, inasmuch as the only logical location of the chiller and transformer is west of the existing building because existing mechanical infrastructure is located within the building adjacent to the proposed locations for the chiller and transformer.

WHEREAS, the Board of Zoning Appeals has found that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare. It is the opinion of the Board that the requested variance would not adversely affect the public interest, inasmuch as there will be no encroachments into public utility easements or street right-of-way as a result of this reduction of the building setback and therefore there will be no effect on the general public.

WHEREAS, the Board of Zoning Appeals has found that the granting of the variance desired will not be opposed to the general spirit and intent of the zoning ordinance. It is the opinion of the Board that the granting of the variance requested would not be opposed to the general spirit and intent of the zoning regulations, inasmuch as the reduced setback will continue to provide for fire protection, separation, light and air circulation, and pedestrian access.

WHEREAS, each of the five conditions required by Section 2.12.590.B, Code of the City of Wichita, to be present before a variance can be granted has been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals, pursuant to Section 2.12.590.B, Code of the City of Wichita, that a variance to Section III-B.6.d.(3) of the Unified Zoning Code to reduce the building setback for Metro Meridian High School on property zoned "TF-3" Two-Family Residential and "LC" Limited Commercial and legally described as follows:

Even Lots 286 through 308, inclusive, and the North 20 feet of Lot 310, on Phillips, now Richmond AND Odd Lots 447 through 469, inclusive and the North 20 feet of Lot 471, on Meridian, Martinson's 5th Addition to Wichita, Kansas, Sedgwick County, Kansas. Generally located at the southwest corner of Maple and Meridian (301 S. Meridian).

The variance is hereby GRANTED, subject to the following conditions:

1. The site shall be developed and required to comply with all building, zoning, screening, and landscape code requirements, except that the building setback shall be reduced from 25' to 2' along the west property line for the "Proposed New Chiller" and from 25' to 12' along the west property line for the "Proposed New Transformer." This setback reduction shall apply only to the improvements shown on the site plan approved by the Board of Zoning Appeals. The site shall be developed in general conformance with said site plan.
2. The applicant shall obtain all local permits necessary to construct the indicated improvements, and all improvements shall be completed within one year following the BZA approval of the variance unless such time period is extended by the BZA.
3. The resolution authorizing this variance may be declared null and void upon findings by the Board that the applicant has failed to comply with any of the foregoing conditions.
4. Approval of this Variance shall supersede and render null and void the Variance granted for the subject property by BZA Resolution No. 2002-00033.

ADOPTED AT WICHITA, KANSAS, this 17th DAY of DECEMBER, 2002.

RUANE: Item #3, BZA2002-00069 Appeal of Administrative Interpretation dated 10-29-02.

PHILIPPS: Mr. Chairman, prior to staff's report, like I said this is a redundant part of my participation today. Although I have no direct connection with this particular case, I do represent the interest of one of the party holders. So, therefore, I need to declare my conflict of interest, and resume my position in the audience again.

RUANE: Other preliminary items, I assume this why the rest of you are here. I want to make sure that everybody has before them precisely the same record. Now, as supplements to the Board packet that was mailed out under cover of the Agenda, I believe that we have all received a letter dated December 13th from Ferris Consulting, and all have had an opportunity to review that. Secondly, I note that just here today there is a copy of a December 16th letter from Harold Johnson, Mike Steven Auto Group. Have all had the opportunity to review that? Those are part of the record and packet of this case.

Also as a preliminary item, recognizing the Board's policy and by-laws in favor of us all being on the same page, so to speak, I must say that a combination of voice mail, and other things caused me to have direct contact. Now, the only person that I had heard from in regard to this item that is not here in the audience today to express their opinion is Michelle Chauncey, who is the president of the D.A.B. in District II. I did not have much of a conversation with her at all, and explained that if she had opinions on this matter, she would need to come and express them today. She apparently must have a conflict. Did anyone else have any similar announcements?

FOSTER: I would like to ask Sharon, could you refresh our memory on what our rules were about receiving outside information?

DICKGRAFE: The by-laws have indicated that if you receive outside information, either written or verbal, that the substance of that information needs to be disclosed to the Board, so that it is clear that everyone is acting upon the same information as part of the record itself.

FOSTER: Wasn't there something about making sure that the material was sent to the staff as well, or was that just in verbiage?

DICKGRAFE: If you received something in writing from someone outside of the staff's flow of paperwork, then yes, and I can't find it specifically here, that information would need to be turned over to staff. I guess it is SubSection 8(h) City Code, and Article II (h) of the BZA Bylaws, which indicates that any member who receives written documents from any source shall forward a copy of the written ex parte communication to the Secretary.

FOSTER: May I ask Scott, did you all receive a copy of the letter from Ferris Consulting?

KNEBEL: Yes, we received, Mr. Rogers had sent us his copy, so we did receive before today.

FOSTER: You sent it to them, then?

ROGERS: Yes, the day that I received it. I contacted Rose and faxed a copy to them.

FOSTER: I just wonder Dale, if there isn't some way on the application or something that we should let people know about this, because this is always something that happens after the fact.

KNEBEL: It is already on the instruction sheet. It directs the applicants to submit them to the staff.

RUANE: Let's proceed with staff comments.

KNEBEL: As was mentioned before, this is an Appeal of an Administrative Interpretation by the Zoning Administrator, in regards of denial of a building permit. The building permit that was submitted was for what is called a Gump Monument Pillar. You have the letter in front of you from the Zoning Administrator. It was determined that the structure in fact is a support structure for a wireless communication facility as opposed to a monument.

In the zoning district, and at the height requested, a wireless communication facility would require approval of a Conditional Use to permit its construction, and so the Zoning Administrator denied the building permit because the Conditional Use Permit had not been approved. Actually at the time of the denial, there was consideration of a Conditional Use for a wireless communication facility on this property. In fact, there has been two applications submitted. There is a procedural history in the letter that describes that. The first facility that was submitted was a request for a monopole communication tower. The applicant modified that request to be a disguised flagpole communication tower. The Conditional Use request was approved by the Planning Commission and was denied by the District Advisory Board, and then was withdrawn by the applicant prior to consideration by the City Council. Subsequent to that, a second request, this time for what was called a stealth communication tower disguised as a flagpole, was submitted and then was subsequently withdrawn after the date that the letter denying the building permit for the monument was submitted.

As far as the documents that you have attached to this, there is the Appeal that was submitted by the applicant. There was one document that was provided by the applicant, that I failed to provide to you, that I did have and I didn't realize that I had, but it was also larger than what we could copy, but the applicant did provide that drawing to you in his letter and I have a copy of it up here that I can show to you. This is the drawing of the proposed pillar that shows, basically, the proposed design. There is also in there, the applicant's original letter, in which the Appeal was filed. The letter from the Zoning Administrator denying the building permit, and then the information the City had on file, regarding the two Conditional Use requests for wireless communication facilities, as well as the City's policies and Zoning Regulations dealing with wireless communication facilities, because we felt like this Board probably had not been exposed to that information. We feel like that is a pertinent issue here.

As far as the review of an Appeal, it is a little bit different than a variance. In a variance you have five factors that you need to determine that exist, and if they do, then you grant a variance. In the nature of an Appeal, the burden is on the Appellant to demonstrate that the interpretation of the Zoning Administrator is in error, and you need to make findings based on the written record and the testimony that you hear today that in fact the Zoning Administrator was in error in order to reverse that. If the Appellant doesn't meet that burden, this Board is supposed to side with the Zoning Administrator and affirm their decision. This Board has a third option, which is essentially a combination of the two, in which you would make essentially your own interpretation, that a portion of the Administrator's interpretation is affirmed and a portion of it is reversed.

With that I think I will close my remarks, the procedure is, as we talked about at the beginning of the meeting, the Appellant has fifteen minutes, the Zoning Administrator has fifteen minutes, and then any audience members would have five minutes to speak on the item. Do you want me to go through the slides that I have of the site or is everybody familiar with its location?

RUANE: Before you go through them, if we could focus them in a little better, I think that would help.

KNEBEL: I will try but I think this is the best we can get. The general area is at Kellogg and Woodlawn. The City of Eastborough is to the north. There are primarily commercial uses, primarily vehicle sales, in the immediate vicinity of the proposed location, and then further to the north, and further to the south are residential uses. The site drawings probably are not very clear on the screen, but you do have copies of those. This is the proposed site. I think the monument itself would go in this location somewhere in here. It is the back gravel parking lot of a veterinary clinic. This is the view of the vehicle sales south of that location. This is the view of Kellogg to the west, and as you can see, it's primarily vehicle sales and a few other commercial users. This is the residential area to the north. As you can see, there are a number of existing trees, some of which will be removed with the construction of the Kellogg Expressway. Then to the east of the site, again, are more vehicle sales and other commercial uses. With that I will answer questions if you have any.

RUANE: Any questions for Scott? I have one question. In addition to the options open to us that you have mentioned, don't we also have the option to send this item back for more fact finding?

KNEBEL: You do have that option, yes, if you feel that the record is insufficient to make a determination.

RUANE: Mr. Ferris.

FERRIS CONSUTLING, GREG FERRIS, P O BOX 537, Wichita KS 67201: I represent 2M Construction, the Appellant in this case. First of all, I would like to make a couple points of clarification. First of all, I want to apologize to Scott in referring that something didn't get sent out. We had a miscommunication on what he wanted from me, and I submitted the drawing that you have, but in a larger form because that is what we submitted to the Building Department.

I have to tell you that this hard for me to be up here appealing city staff, because I have such a high regard for them, not only the years that I was here but, also in working with them. Mr. Schroeder is an above caliber Administrator. Mr. Miller and Mr. Knebel are exemplarily in their efforts. So to be here is not a lot of fun for me. However, I believe that staff is just wrong in this case, and I will go into the reason for that.

I think there are really two questions, and I think Mr. Knebel hit those, but to reiterate those. One, is this a monument? Secondly, is this a wireless communication facility? To be a monument, it has to be a non-habitable structure erected in memory of the dead or of a person, event, etc. That is what the Unified Zoning Code that we operate under says. You have the definition in front of you. There is nothing more to it. That is the definition. A non-habitable structure, pillar, column, any non-habitable structure erected in memory of the dead or of a person, event, etc.

If you will look at the site plan that I gave you, you will see a dedication stone. This is dedicated to the Gump Family. The Gump family has a history on this property that is really quite phenomenal. This is not something that is lightly perceived. In fact, there was an article in the newspaper about Mr. Gump, as one of the people who is a letterman from Kansas State and KU. His family bought this property nearly one hundred years ago. It is probably the single longest anyone has held a piece of property along Kellogg. They have literally turned down hundreds of thousands of dollars for this property to keep it in their family. It is important to them. We are dedicating this monument in the memory of that event of them taking possession of this property. There is a dedication stone. It could not be clearer on the plans that were submitted that there is a dedication stone. It also could not be clearer that this is a non-habitable structure. I don't think that we need to go into a lot of detail on that. But, I think for your information also, I provided, and I did provide to staff as well, a colored picture. This is the design that was given to the designers of this monument. I know that this was physically delivered to the designers and designed after this, and if you read it the last monument to be built in the Roman Forum. This was the basis for the monument that was constructed. Obviously, you can't make it look exactly alike, but I think if you look, you will see the basic similarity between this and what was before you. There is not any question in my mind, and I don't think there is much question in staff's mind, that this could be considered a monument. Dedication stone clearly dedicated. It is a non-habitable structure or pillar, clearly within the definition of your Zoning Code. There can't be any mistake. There is nothing in the Code that says what this has to be made of, or how it has to be constructed, or what it has to look like. It just says, and you have the one sentence definition. The fact that the Code is silent on every aspect of monuments except this definition and setback requirements, which I don't think staff will have any issues that we meet all the setback requirements for a monument, there is nothing else in the Zoning Code. There is no height restrictions except for setbacks. We could build this taller. So I think to argue whether this is a monument or not I don't know how you argue that this isn't a monument. It fits the definition. It may not be what somebody likes a definition of a monument to be, but what the definition of the Zoning Code for a monument this is.

The second part of the question, is this a wireless facility? Now, I have only done about a hundred wireless communication facilities. I have done them in Wichita, Sedgwick County, and I have done them in ten communities, and in two different states. I think I know what a wireless communication facility, is but you may not. I only made one copy to present this, but this is what I submit in the hundred applications for a wireless facility. It is very extensive. A wireless communication facility by definition must be able to transmit wireless communication. Now, if you will look at those plans, you will see that there are antennas, telephone, electrical, equipment, access roads, fencing, cables, antennas, and most importantly, it has got to be able to fit the definition of a wireless communication facility. It must be able to transmit wireless communication. There is nothing in the plan that we submitted, and in fact we submitted this sheet and a survey, and then some additional information that was requested by the Zoning Administrator, but our initial application was two pages, and we submitted some other stuff afterwards. All of that would have been added to that, and a normal submission is about this thick for one of these towers, and one of these wireless communication facilities. While the definition of a wireless communication may include the words, monopole, support structure, this is not a monopole. That is a monopole, a monopole has ports, has ports for the attachment of antennas. By definition, that is what it is for. This pole has no ports where an antenna can be attached. No antennas can be attached

to this pole it is not a monopole. Well is it a support structure? If you look at what a support structure is in the definition of wireless communication facility it could be a building, it could be a light pole. A support structure by definition is basically anything that anytime, anywhere, could hold anything that has to do with wireless communication facilities. Basically, half of the buildings in Wichita, in fact every building in Wichita could be a support structure. So, I don't think that the Code was indicating when it gave you a definition of a wireless communications facility that included a long litany of things, but happened to include support structures and monopoles, that they were referring to something that was a single page application submittal.

Let me go into a little more detail on this, because I think it important. A wireless communication facility means, facilities covered by the location design guidelines, includes the following terms as defined, and then you go through, and it talks about antennas, but it also says site, and location. So, if you wanted to pull one word out, does that mean that a site could be a wireless communication facility? Obviously not, does it mean a location? No, it takes the combination of these words to make a wireless communication facility, because it takes a combination of these items an antenna, a support structure, equipment, to be able to transmit wireless communication. So, by definition, what you have before you is not a wireless communication facility. There is no way for that facility to transmit wireless communication. There is nothing there that can do it.

As I spoke earlier, the design of this monument was taken from a historic monument. It was a monument recognized by historians. I think you see that was pulled off an educational website. It was defined as a monument, and historians are clear that this is a monument. You know in 20, 30, or 40 or a hundred years from now, if these things was still able to be standing like it was in the roman empire; somebody would say dedication stone, it is a monument. So is it a monument? Or is it a wireless communication facility? That is really what your duty here today is to decide. It is clearly a monument, and the idea just because somehow or another, this could be turned into a wireless communication facility in the future, really the Code is silent on whether or not that is allowed. What the Code is clear on, however, is that I have a right to submit a building permit for a monument if it meets the criteria that your Zoning Code has, and clearly this does.

So you are asked to determine whether or not this drawing that you have is a wireless communication facility. When you have a document that shows you what truly is a wireless communication facility with all of its cables, and all of its wiring, and all of its antennas, and all of its security, and all of its access. Or is it a monument, which is statue, pillar, or other non-habitable structure erected in memory of a dead person, event, etc., pretty broad. Clearly what you have before you is a monument. Clearly it is not a wireless communication facility. Staff may not like the way that Code is written in this case, and I have had some discussions with them after the fact, and I think there may be some weakness in the way that the Code is written. That is not my problem, and it really isn't for you to determine. What your determination is did we apply for a building permit that meets the criteria of the Unified Zoning Code of the City of Wichita? Clearly there can be no dispute that we did. I will be glad to answer any questions you may have at this time.

RUANE: Any questions for Mr. Ferris at this time? I have one. Will this monument never be utilized as a wireless communication facility?

FERRIS: I would never say that. I represented Mr. Nordyke in the wireless communication facilities request. I was not originally representing him when he applied for the building permit. Mr. Marlow is here as the 2M Construction, who I represent this case, and has hired me after the fact because they knew I knew how to do this. I was not involved in the submissions. I was involved in the submissions

of the wireless communication facility, so to say that this will never become that, no, I could never say that.

RUANE: Were you involved in the proposal to build the 130-foot flagpole cell tower?

FERRIS: Absolutely, yes, that is what I was doing.

RUANE: What would have happened, in your opinion, if you had first just submitted an application to erect a 130-foot flagpole?

FERRIS: I am sorry, I didn't quite follow you. You mean back in the original submittal? If we would have submitted an application for 130-foot monopole, I mean flagpole, from day one?

RUANE: A 130-foot flagpole with no electronics, no wiring, no cell tower capability.

FERRIS: Staff told me that a flagpole could be 30 inches, so if I wanted to submit one that was 30 inches for a 130-foot flagpole, that they would approve it. They told me that they would approve it. But, it would not have been this big around, in their opinion. So, they put in criteria that said that we don't think that is a flagpole, so we wouldn't approve that, Greg. That is what they told me. But, if I just wanted to erect only a 126-foot, if we wanted to maybe 124-foot, I can't remember the calculations. To do a monument, which a flagpole does fall under that criteria, there is a setback requirement from how far you can be from property that is zoned "TF-3", and even though the Steven Group, whom you have a letter from of support, owns that property, it is still zoned "TF-3", and the Code is very clear on how far you can be from that. It is either 124 or 126-feet, so that would be the tallest flagpole that you would be allowed to do.

RUANE: What is the applicant's position on how this monument is distinguished from the flagpole? Which was referred to as a stealth tower, and stealth is not a major term, it is a term of art. What is the difference between the flagpole proposal and this proposal?

FERRIS: The flagpole was taller, included antennas, included ground equipment, included access roads, fencing and included all of the things that the wireless communication facility contains. It was truly an application for a wireless communication facility. Make no mistake about it, and it would have been a submission that would have been, maybe at least this thick maybe thicker, because of some of the stealthing that may have been involved in that. Never actually done a building permit application for a stealth flagpole, so I don't know exactly what it would contain, but I know it would have to contain at least that much information.

FOSTER: Do I understand that this was designed or just to be constructed by the 2M Construction Company?

FERRIS: It was designed by MKEC. I believe that would be on the original design, and it would be constructed by 2M Construction Company.

FOSTER: Has the 2M Construction Company constructed communication towers in the past?

FERRIS: Absolutely, they have constructed communication towers, buildings, they are a regular construction company that has the ability to do a multitude, the general contractor for, in fact, Mr. Marlow is here. He is the general contractor, has their license, and they are getting ready to embark on several buildings. I believe it is the one that Mr. Phillips has a conflict on. It is a multi-million dollar

strip center, so they are just a general contractor. But, yes, they have done probably about two or three pole constructions.

FOSTER: Ok, on your application on August 8th, 2002, for the Conditional Use for the Cricket Communications who designed that?

FERRIS: That was designed by Dynatech, I believe.

FOSTER: Who was to construct it, or do you know?

FERRIS: I believe that was to be determined. Obviously, what you generally do you get the Conditional Use approved. Then, you go out and get your building permit. Once staff has made whatever changes, then you go out for bid on that. I have submitted like I said probably close to 100, and on 75% of those we don't have the contractor until such time as we have determined who gets the bid, and it is usually after the fact because they don't like to do change orders, because they are pretty involved.

It really goes with the same questions, Mr. Foster, is that communication towers are so involved, and I don't care if it is VoiceStream, Cricket, A T & T, or whoever, I have ever worked for, they don't like to select a contractor until after they have done a building permit, because they are so involved that staff may make multiple changes, and they don't like to do change orders, because they are so detailed and there is so much in a plan where on this simple monument, when it is a one or two page submittal, there is not going to be much, so you can have the contractor from day one.

FOSTER: Do we have any comparable monuments in the City like this?

FERRIS: Not that I know of necessarily. I can't think of any off the top of my head, but when they did the art work at Kellogg and Main, we didn't really have anything comparable to that. I even asked staff, you mean if I submitted something that you thought was a monument, and in your mind you are more comfortable on this location, and it was 115-feet tall across for example, which everyone would consider monumental without even blinking an eye and they said we couldn't deny you that. So, no, one that looks like this, no, and I think that was one of the reasons that they approached it was they wanted something unique.

RUANE: Greg, what is the height of this ancient roman monument?

FERRIS: I believe it is about 78 feet.

RUANE: What is the aesthetic or design explanation for the height sought for this particular one?

FERRIS: It was shorter than was allowed, and they thought that fit what they wanted to show. I don't know that there was anything specific in the criteria for height that they had laid down.

RUANE: What is the height sought?

FERRIS: The height is 115 feet or maybe 114 feet.

MARKHAM: Mr. Ferris, I was wondering, you said the 2M Construction Company is constructing this, in the construction would it be possible to have adaptable features, say if you get the permit for the

monument, could you not add adaptable features to transfer this into a wireless communication facility in the near future?

FERRIS: Sure you could.

MARKHAM: Second part of the question, if so, would this entail you coming back to get a second building permit or some notification from the City to change the purpose of your monument?

FERRIS: If they wanted to do any adjustments to this they would have to apply for a building permit. Other than what you have seen submitted before you, they couldn't make any changes to this. That is what the building permit would be for is what you see before you. If they wanted to make any changes to that, they would have to either amend their original submission for a building permit or they would have to apply for another one.

RUANE: In that application to convert it to a wireless facility, they would have to apply for a building permit, but would it require a variance or other administrative review?

FERRIS: It would require a review by the Director of Central Inspection, and I believe Mr. Knebel could probably address that better. I think Planning will look at that too? Or do you not? I think it just goes through the Superintendent of Office of Central Inspection.

KURT SCHROEDER (in the background, not at podium): If the height didn't increase by more than 25% of what was existing, it would be building permit approval, and no review beyond that.

FOSTER: I just want to make sure, would it involve ever asking for a Conditional Use for a communication facility? At what point would that kick in?

FERRIS: Whenever you extend above 25% of 115-feet. The original design was for 165-foot monopole. It was 130 or 140-foot expandable to 165-foot. If you went above the 131 feet you would have to get a Conditional Use Permit.

FOSTER: Is it useable in its height now as a communication tower?

FERRIS: No, it is not. There is no place to put antennas. There are no ports.

FOSTER: Not the construction but, is it at a height that it could serve a provider?

FERRIS: It could, sure. Anything over 80-feet could serve a provider. I mean VoiceStream just did an 80-foot tower over at Central and Rock Road. So, generally, anything over 70-feet. I have even seen them as low as 60-feet, but not in Wichita very often.

SKELTON: Mr. Ferris, so basically what you are saying is that there is no way to slap an antenna at the top of the thing without some kind of review or conditional permit or something?

FERRIS: We would have to get a building permit. This pole could be modified. I am not going to lie to you and tell you it couldn't be modified. You would have to do some extensive work to the pole and a lot of ground work. You would have to do grounding. You would have to do co-ax. You would have to do all of those things.

SKELTON: And all that would be under Mr. Schroeder's jurisdiction and review?

FERRIS: Yes, and if he denied it we could be back here, so I guess there is a possibility if we applied for building permit and he denied it.

KNEBEL: Actually, if a building permit for a wireless communication facility is denied, that would be appealable to the Planning Commission.

RUANE: Any other question? Mr. Schroeder would you care to make some remarks?

KURT A. SCHROEDER, SUPERINTENDENT OF CENTRAL INSPECTION and ZONING ADMINISTRATOR FOR THE CITY OF WICHITA: I think that our focus is very similar here, so I think Mr. Ferris has pointed out those issues that, really, I looked at in making my decision. I do want to give you a little background, and context of how this came about. Conversations that were going on between late September, all the way through early November before this appeal was filed, and after the permit had been rejected.

First of all, the Superintendent in making an interpretation, as you know, has to not only look at the Unified Zoning Code, but he has to look at, or he or she, has to look at other relevant documents. In this case there are two very relevant documents, in my opinion. Those are, number one, the Unified Zoning Code, the definitions primarily in Section II-B, and the Unified Zoning Code Supplementary Use Regulations for Wireless Communication Facilities in Section III-D6.g. There is also the Wireless Communications Master Plan, dated August of 2000, which went through about a year long process, and Mr. Ferris is very well aware of this. Prior to its adoption there were a lot of citizens, communication, wireless communications providers, tower builders, and others who were involved in that process. I do want to read from, and I think you have a copy of the Wireless Communication Master Plan, but the Executive Summary of that documents states, "The City of Wichita and Sedgwick County have decided to modify regulations for wireless communication through a Wireless Communication Master Plan. The Wireless Communication Master Plan attempts to provide a clear sense of intention for wireless communication industry representatives, tower builders, landowners, and the general public on where and how City and county leaders hope to see the new facilities deployed in the future. All of the various stakeholders have been consulted extensively during the preparation of the Plan."

TAPE CHANGE

SCHROEDER: This particular site had an application for a Conditional Use that was filed on, July 1, 2002, for a 130-foot wireless communication facility. It was approved, and reviewed by the Metropolitan Area Planning Commission. But, it was withdrawn just prior to going to the Wichita City Council in October. Subsequent to that, another Conditional Use application was filed, for the exact same site, exact location on the site, for a stealth wireless communication facility, which was disguised as a flagpole that has been talked about, and that application was actually in process at the time that the building permit application came in, but was subsequently withdrawn on, November 6, 2002, about a week after my letter was issued.

The building permit for the Gump Monument was submitted on October 18, 2002, as you know was rejected ultimately by me for the reasons identified in the letter. The site plan placement of the pole was identical to both those Conditional Use applications, and the request of engineering information clearly showed that this was the same exact pole from Saber Communications that was originally to be used for the stealth wireless communication facility for that flagpole. In fact, some subsequent engineering information submitted for the permit after the initial submission included, Nordyke Ventures, LLC, as the customer in addition to 2M Construction, who had applied for the permit. Nordyke Ventures, LLC

was the owner of the facilities on the two Conditional Use applications, and the facility being basically the support tower.

There was a lot of conversations conducted with Mr. Ferris, representing Nordyke, and others, and actually, Mr. Mark Nordyke, of Nordyke Venteres, LLC, during October and November time period. As I said, Mark Nordyke, signed the Conditional Use applications as owner of the facility, that being the wireless communication tower. In conversation on, November 4, 2002, and November 5, 2002, Mr. Nordyke, clearly indicated to me that he had a second business in terms of trying to provide and construct wireless facilities and towers for providers and carriers of wireless communication facilities, and that the pole to be used for the Gump Monument, which we had now gotten this application for, was indeed the same pole that was to be used for the stealth wireless communication facility that was the subject of the Conditional Use on the stealth flagpole. Mr. Nordyke and his agent, also Greg Ferris, had indicated several times in their conversation with me that the Gump Monument pole was exactly the same monopole that was submitted for the wireless communication facility under Conditional Use 2002-00050. In several conversation conducted with Mr. Nordyke in October and early November, it was indicated that the monopole needed to be permitted and erected by year's end 2002, to ensure that the Cricket Communications would place their wireless facilities on that pole, and commit to that site.

On November 5, 2002, Mr. Nordyke even told me that he knew that there was need for wireless communication towers in this general area, and that another carrier, in addition to Cricket, had been talking to him. It was his intent to put that pole up for those purposes.

I did want to talk a little bit about the definitions that Mr. Ferris has mentioned. First of all, the definitions of wireless communication includes a tower builder. Defined in the wireless communication plan, "as a company or individual that builds or manages support structures for wireless communication facilities." I guess I would submit after all of this going on and all these conversations that Mr. Nordyke, and Nordyke Ventures, LLC, meets this definition. So that even erected without the wireless communication equipment, which of course he would lease space to those providers, this monopole should still be considered as a wireless communication facility, under the Master Plan and the Unified Zoning Code.

With reference to the November 16, 2002, BZA Appeal letter for Mr. Ferris, that he submitted. Number one, it was a little mistaken. The Unified Zoning Code has no definitions for commercial communications towers. That doesn't exist anymore, only for wireless communication, and wireless communication facility. By these definitions, and you have those there, a wireless facility or communication does not have to include separate structures, accessory equipment, etc., which Mr. Ferris has talked about. It could include those things, but it also could include the support structure that was built by a tower builder or others in support of those kinds of structures or facilities.

I did want to mention, since Mr. Ferris had talked about it, about 2M Construction, and then you had some questions about if he had built towers before. What I wanted to mention here is that 2M Construction did apply for this permit. But as I mentioned before in subsequent information, that we needed in terms of engineering and wind loading and things of that nature on the pole, the stuff that was submitted included Nordyke Communications and Nordyke Ventures as an applicant with the same exact pole by Saber Communications. Also, he mentioned the monopole that it didn't have ports. The monopole definition in the Wireless Communications Master Plan does not indicate anything like that it has to have ports. It says, "the type of support structure that consist of a vertical pole fixed into the ground, and attached to a foundation." There has been a lot of conversation about this particular item over the last few months, and as Mr. Ferris mentioned, conversations he has had with staff, and some of

that was about was, well, this needs to be up for Cricket to commit to this site. We need it or the owner Nordyke needs it. Can we put it up as a flagpole?

There are things in the Unified Zoning Code that talk about customary, typical, and everything that we could find, and he could find, on flagpoles. I think it indicated that a 100 or 120-foot flagpole was typically 24 inches to maybe a maximum of 30 inches for the base. So the scale of this thing was out of proportion with that. So then there was the focus on what about a monument? Can we call it a monument, if we design a monument? No, was my response. Because of the background here, this is going to be for communication facility. I concur that if all of this had come in under a different circumstance, there was no Conditional Use applications, discussions, and things with the providers to put stuff on this particular tower, or monopole, this would have been looked at a little differently. I agree with Mr. Ferris, that just reading the definition of "monument" in the Unified Zoning Code is open for a lot of interpretation, and it would have got different consideration, probably. But there is a lot of history prior to that, and a lot of discussion, and comments made directly to me by Mr. Nordyke and his agents about what the intent of this site was in terms for this monopole.

Again, going back to the Wireless Communication Plan, intent is something that people don't always like to discuss. But, obviously, that is in the Executive Summary, we were trying to define intentions, so that not only all the providers, and the tower builders, and everybody else would know kind of what to expect, but what neighborhoods could expect in terms of looking these applications, and having the ability to comment. So this about the interpretation in context of both the Wireless Communication Plan and the Unified Zoning Code, in my mind, and it is not about whether you approve a wireless facility at this site or not. That would be for someone else to determine. But, that basically is where I was coming from in my review. In fact, when I talked to Mr. Ferris a little bit before October 29, 2002, he had indicated that they would proceed and file the Conditional Use, and proceed with that process, which he did, but after the permit was submitted, which I am not sure that Mr. Ferris had indications, that was being done. In his defense, it was subsequent. The Conditional Use was withdrawn about a week or ten days later. Those are my comments, and I will try and answer any questions you may have.

RUANE: What questions does the Board have for Kurt?

FOSTER: Mr. Schroeder, do I understand if we forgot all of the issues of the prior applications for Conditional Uses and someone came in with this design and called it a monument, do I understand you to say that you do not have a problem that it would be indeed a monument?

SCHROEDER: I didn't say that. What I said was, and I think Mr. Ferris will concur, that if it weren't for all this history and what people had been saying was the intent of this pole, it would have been looked at differently, and may have been approved, and that is all I can say. I would have looked at it in a different context.

FOSTER: Would a monument of this height be allowed, if we knew nothing about communication towers or anything else? Do you have any way answer that question as to what the height is allowed?

SCHROEDER: Again, we looked at that a little bit, and probably in the current language of the Unified Zoning Code, there is a good possibility that it would have been allowed. But I didn't really review it totally in that context. Because what I was driving at, in that rejection of that building permit application, was the fact that this was the site, the pole, and I had been told by people, and the owner of this pole what the intent was.

FOSTER: Let's say that this were put up. What would be the next step, if I went and bought it, and I wanted to make it a communication tower? What is the next step? What is the next least intrusive step that I could do to apply?

SCHROEDER: You could apply and adapt, I assume you are talking about a wireless communication facility?

FOSTER: The most minimum standard, what would be the next step?

SCHROEDER: As long as it didn't exceed 25% of the height, and they didn't have to go back and make any more massive monument changes or base for it, they could probably just come in for a building permit application. Again, because now a wireless facility is going on it, they would have to show proof that there is a need for that tower, in that location, which has also been done through these Conditional Use Permit processes, and if all that is there, and can be supported, and shown, a building permit would be issued. Then the pole would be adapted to take the wireless communication facilities to attach to the top for Cricket Communication or whoever else it might be.

FOSTER: Your present comments, then, would be based on not applying for a Conditional Use. This would be a total staff decision at that point, right, for a building permit?

SCHROEDER: Well, at that point it is an existing structure, and in the way that the Wireless Plan is written, there would probably be that administrative approval just by simple building permit, no hearings, no joint review by Planning Director itself, or anything.

FOSTER: Now that assumes that it would be built properly for that purpose, so to speak, and so they could automatically go 25% or did you say 20%?

SCHROEDER: Not automatically. They would have to show all those documents, Mr. Ferris referred to, say that we have a need in this area, and there is a gap, and there is no other structure that would support it, and you have to prove that.

FOSTER: Did they do that before, for this site?

SCHROEDER: To a degree, they went to the Planning Commission for a site, and convinced the Planning Commission that was fine, because they voted approval. It never made it all the way to the City Council level.

FOSTER: Well, it was withdrawn.

SCHROEDER: Yes, it was withdrawn. Then a second application was filed, and was withdrawn prior to being scheduled for all those hearings.

FOSTER: I hesitate to ask this. Sharon is there any way to guarantee that this would not be used for a communication tower? Or is it possible to have any kind of restrictive covenant on this to prevent it from being used? We have had those things on variances in the past, and I know what we are getting into here, but I wondered if this question came up.

MILLER: My feeling is that this is just an interpretation, and that the only thing you are being asked is to decide is between the two arguments, and that we can't attach, I don't think you can attach conditions on an interpretation.

DICKGRAFE: I would agree with that, and I looked at that, when I was hearing the arguments today. I think had this been a variance request then the Board could attach certain conditions. I don't see anything in the Zoning Code, and maybe Joe or Kurt could correct me if I am wrong, that is part of the building permit process which allows a Zoning Administrator to attach conditions. Absent that, I don't think that this Board has the authority to attach conditions to either the interpretation or the decision to issue this building permit with "X" conditions.

FOSTER: Mr. Schroeder, do you have any comments to that?

SCHROEDER: I guess I can agree with that based on Joe shaking his head too. I do want to make a little bit of a comment just in the context of the Wireless Plan. Don't forget that the Plan does encourage wherever possible the use of existing structures. So you have to build a new tower or structure and encourage stealth structures which was the process being gone through which was withdrawn. It really focuses down to the intent of the Wireless Plan, and the intent of what is going to go here in the very near future based on what I have been told by the owner of the facility.

FOSTER: So, if they came in then, and convinced you that they could meet the Building Code and they could meet the need assessment for this location, which is purely up to them, I assume, then you really wouldn't have any discretionary question whether it could be approved or not. I mean they have meet the criteria at that point right?

SCHROEDER: I think that is correct, and that was the idea of the Plan when it was developed was to allow for administrative procedures, when practical, and to use existing structures when possible.

RUANE: Let me follow-up exactly on that, because say this monument is constructed, and then the application to make use of it as a wireless communication tower comes in, either at its existing height or at a height not to exceed 125% of that, what would be the procedure through which that application were granted? Perhaps more importantly, what if any grounds to deny that application would staff have?

SCHROEDER: It says here, "streamline review process, but one that is guided by principals, and guidelines outlined below: The wireless communication facility should be permitted by right in any zoning district subject to the issuance of a building permit if they conform to the location design guidelines in this chapter." Which a lot of this information that I am talking about, you have to prove that you need it in the height and in all that kind of thing. One of those is, "modifications, and/or replacement of support structures by poles, flagpoles, electrical poles, private dispatch towers, etc. as examples that are not significantly more visible or obtrusive including cumulative height extensions of up to 25% above the original structure height." And the way that this written, and met those criteria you would issue a building permit, and they would go do that, and that would be it.

RUANE: So the permit would be issued?

SCHROEDER: Yes. Now if they came in and took a flagpole that was 18 inches wide at its base and even though it is the same height, but it is 5 times wider, we might reject it even though it is not 25% higher based on not significantly more visible or obtrusive.

RUANE: Is the reason for the streamlined building permit process for erecting a communications relay structure on top of ...let me start over on this...Is the policy to encourage locating these on top of buildings and other structures already in existence? Is that what makes this streamlined procedure part of the Wireless Communication Plan?

SCHROEDER: That is a major part of it, yes.

MARKHAM: Was this in reference to the Conditional Use that was granted previously, was this not accepted by the District Advisory Board, if I read correctly a couple of times it did not pass the District Advisory Board?

SCHROEDER: That is correct. I think it went to the District Advisory Board just a few days before the Planning Commission meeting. The District Advisory Board did not recommend approval. That is all they do is make recommendations, and the Planning Commission did approve it, and then when it got to the Council level, October 8, 2002 or sometime about that time, it was withdrawn, I think a day or so before that by the applicant.

SKELTON: Mr. Schroeder, what is the maximum height of this pole that can be built without a variance?

SCHROEDER: Twenty-five percent of 115 feet or 114 feet.

SKELTON: So what is the maximum height under the Code now? Would that be 140 feet?

SCHROEDER: It would be 150 feet in Limited Commercial zoning, is that right Scott? You could even go above 150 feet on an existing structure.

KNEBEL: Actually in the case of either a monument or a wireless communication facility there wouldn't be any instance in which a variance would be required to allow a specific height. Because both of those types of structures are exempted from the maximum heights of the underlying zoning district, which is where you would get into the variance situation. However, there are requirements for compatibility setbacks between the structure and the property line of the nearest property that is zoned for two-family or single-family uses. There may be an instance where you would have a height for that compatibility setback that would need to be modified and those are modified, by approval by the Planning Director and the Zoning Administrator through a zoning adjustment.

RUANE: Thank you. Let's hear from anyone else who would like to comment on this item. We will give you five minutes, but let's try to move this along. We need to keep going.

ALLEN JOSEPH, 22 WILLOWBROOK: Unfortunately, I have been involved in this process for some time. I think the process has been pretty much a good process, with several exceptions. I don't know if those exceptions are really important or not, but really this is the same dog with new fleas that I have been listening about for 6 months. What this is is a cellular communication tower. It is not a monument. Everyone knows that, and so does Mr. Ferris. I think, in fact, this is all about locating cell towers, and there is some dispute whether it is really necessary or not, and I don't want to bore you with that today.

But, I do think that this process where we are here today. I agree with Mr. Schroeder. There is no reason for me to go back through his comments, but I think it would be a substance over form situation. There is Mr. Nordyke, who has been in my office on many occasions since I filed the petition that would require the City Council vote. He was in my office the week before the Tuesday meeting, where the Council was to vote, and he stated that he wanted me to withdraw my petition because they found a loophole, and they were going to proceed with a monument as opposed to going through the Council

procedure and gain a Conditional Use approval by the City Council. So I feel this is just an end run around the process that has been set up. Thank you for your time.

RUANE: Did you state your name for the record?

JOSEPH: Yes.

RUANE: Anyone else in the audience to speak. Ok, there being no other comments from the audience, Mr. Ferris would you like 5 minutes of rebuttal time?

FERRIS: I think there are a couple of points that are important to talk about. Just to go with the history just a little bit. I am in this situation because I do this work. I represented Mr. Nordyke, as Mr. Joseph knows, on the original applications. He asked me to make some conversations with Mr. Schroeder, as I did, and I told Mr. Schroeder at the time that I wouldn't be filing any building permits for any monuments because that wasn't anything that I was involved in. Once it got to that point, Mr. Marlow, of 2M Construction, did contact me to go down that road. I can't address specifically the conversations that Mr. Nordyke has had with any of those here today. I can talk and answer any questions about those conversations with Mr. Schroeder, because I was involved in those. It was never my understanding that we were going to get to this point. But, there are a couple of facts that I do know about, and I will bring those into the light.

First of all, while this may be part of the same pole it is my understanding, as talking with Mr. Marlow, this is not the same pole that was applied in the Conditional Use Permit. That pole, it was 130 foot. It had various parts to it, so this is a part of that pole, and that is the reason why that particular structure is being used, because Mr. Marlow is able to acquire that pole because it is readily available. It has fluting, which a monopole doesn't have, and I have done a lot of monopoles, and monopoles are very smooth surface. Now by definition in your Code, they may have the fluting, but normally, they don't. I never have seen one with it. So to make a monument, you really want that design. Obviously, if you are going to make a monument that looks like the picture it needs to have that, and that pole was readily available.

Second, if you are going to erect something that is over 30 foot tall, which happens to be the height of those buildings around there, so there wouldn't be a point to doing a monument that was short, you really have to do some extensive foundations. There isn't a lot of places that you can go to get structures that you can build of that height, so if they are readily available, which this one is, they can use that. Mr. Schroeder is correct, this structure is part of that pole, but without modifications, and really some significant modifications, it cannot become a wireless communication facility. It is not possible. The other part of that, that I think is important, is that we do have to, and I do know a little bit about how you apply for wireless communications, as I have said, I have done about 100 of those, we have to have a carrier. I am not even sure, because we are now in this court, is over, there is no way to put Cricket Communications on this tower, if there was a tower by the end of the year. I am not sure that we could even document to Mr. Schroeder that we had a carrier for this. There may be in the future, but this monument is going to be erected whether or not there is a carrier, so that means that we don't know if it is ever going to be. You have to have a carrier. I have to come in here if I want to get a wireless communication facility approved, part of that approval is that I have a carrier to go on it, and I have to have a registered letter from them, a notarized letter from the carrier that says we are going to go on there, number one.

Number two, we have to, and I think Mr. Joseph eluded to the fact that he is not sure or convinced that there is a need, on the original application staff recommended denial, because in their minds we did not

demonstrate that there was a need for a wireless communication facility in this location. So if I wanted to make this pole a wireless communication facility, I have to prove to him that there is a need. So to just say that we can, and there is that thing that we can now put antennas on it, you can't do that. It doesn't work that way.

So in deference to Mr. Joseph, this is a monument. I know it is a monument. What we are erecting, and what we are permitting, is a monument. There is no doubt in my mind. It fits the criteria, not only locally by what your ordinance says, but historically of what people would consider a monument. If you went out and showed people pictures of this, and said this was dedicated to the Gump family, do you think this is a monument, and the majority of the people would say "yes" it could be a monument. It doesn't take rocket science to think what a monument is. That is really subject to some interpretation, and since it is subject to some interpretation it was designed after a monument. We have demonstrated that, and it meets the criteria of your Zoning Code for a monument, so I believe it is a monument.

What happens to it in the future depends on a lot of things, and what that future holds I don't know. I am not really comfortable appealing the city staff. I am not comfortable with that. In this case, I don't have a problem with it, because I think that it is right. I am not looking forward in the future to coming back, and doing arguments over what wireless communication facilities are if we had to do one here. I know how much it is going to be scrutinized by Mr. Schroeder. There is going to have to be some serious documentation to show how and why this is needed before it could ever become a wireless communication facility, which means that it is not a wireless communication facility today. A wireless communication facility you have to document need, and look at the Code before you, and you have to show who the carriers are that are going on this, and all of these things have to be proven to the staff so there is nothing in here that we are doing that even gets to that point. Why? Because it is a monument. It is not a wireless communication facility. With that, I think my time is up.

I appreciate your attention, and I know that any time that you have appeals of staff it is difficult, and the reason it is difficult, is because they are good, and they really try to serve the public, and the best interest of the public, and then it becomes your job to weigh the arguments. I don't envy your position, because I know that you as citizens are appointed to this at no pay, and long hours to do what you think is right, and in this case I believe the Code is very clear that this is not a communication facility. For it to be a communication facility would take quite a bit of leg work, quite a bit of documentation, and quite a bit of proof, and so that means that it would have to become something in the future, and it would take a lot to do that. That is not what it is today. What it is today is a monument.

RUANE: Thank you Mr. Ferris. Okay, we will bring the discussion up here, and we will determine this matter. As pointed out earlier, and I just wanted to refresh your recollection, this is quite a different standard of review, and quite a different job than we have typically in our variance requests. Our guidelines are only that there is a presumption of correctness of the Zoning Administrator in his interpretation. The burden of persuasion is on the applicant to show that the interpretation was in error, and our standard is to determine whether or not the interpretation was reasonable. With that, I guess, I will start the discussion or ask for a motion at your pleasure.

FOSTER: I have a question for Sharon. Sharon, you have heard the same information that we have, and you provided us with an outline. Is there anything that you would add to your outline, or any of your comments, now that you have been able to hear the information? Would you add anything to it?

DICKGRAFE: I don't think so. I think that my memo, as best as possible, outlined the information and is consistent with what both sides have indicated are the issues, so I don't really have anything to add.

FOSTER: May I, Scott, would you change any of your comments that you've heard anything today that would be different than what you have prepared prior to the hearing?

KNEBEL: No, I don't have anything to add either.

RUANE: This is a tough one, and I very much appreciate all of the courtesy that all parties have demonstrated for one another, and it certainly makes our record easier to make when people are polite and don't speak over one another, so I commend you for that. This is a difficult item, so I guess the question is whether or not we truly do look at it as substance over form, or form over substance, and what other standards would apply, and what precedent we might establish here.

SKELTON: I will just say one sentence here, and I may say more later. I may not. It is impossible for me to believe that it is not being built with the intention for future use to be converted into a wireless communications facility.

FOSTER: I think that one of the criteria, which we should take into account and have the right to do that, is the history of this project. In other words, the logic that went into the background to make it. I think without that it would be a very difficult decision to make, but I think that we know that, and it has been documented, and the applicant does not differ with that history, and I think that should be part of the consideration of this Board.

ROGERS: After reading all of the material that we were given by both sides, and listening to the remarks today, I agree with Mr. Schroeder's decision. If I were going to build a monument, I think it would be located in an area of this picture that Mr. Ferris passed out that blends in with the area in which this monument without other buildings and the landscape. If this is a monument it is being located in a odd place in my mind, behind a car lot, and where the average person that might want to see this, how do you get back to see it.

FOSTER: I would like to add to Mr. Rogers point that I did ask that there does not appear to be any other monuments around town that indicate or serve that purpose that would give us the basis for thinking that this would be a monument.

RUANE: If there are no other comments, then a motion is appropriate.

FOSTER: I feel very strongly that the history of this project has a lot to do with this decision, and that this is indeed a stealth type of communication tower and therefore.

**FOSTER moves MARKHAM seconds,
MOTION TO AFFIRM THE DECISION
OF THE ZONING ADMINISTRATOR**

**HAVING CONSIDERED THE ENTIRE RECORD REGARDING THIS MATTER AND
HAVING HEARD THE EVIDENCE AS PRESENTED TO THE BOARD HERE TODAY, I
MOVE THAT THE BOARD MAKE THE FOLLOWING FINDINGS:**

- 1. That the Board of Zoning Appeals has jurisdiction to hear this appeal, pursuant to K.S.A. 12-759(d) and Section 2.12.590 of the Code of the City of Wichita Kansas;**
- 2. That the Board makes the following findings of fact:**

- a) **The Zoning Administrator, pursuant to Article V, Sec. H-1 of the Wichita-Sedgwick County Zoning Code, had the authority to make the written interpretation issued on October 29, 2002.**
 - b) **Based on the testimony presented, documents filed by the applicant in CON 2002-38 and CON 2002-50, the proposed structure is an attempt to circumvent the Unified Zoning Codes requirement that a conditional use be granted for wireless communication facilities.**
 - c) **The proposed structure is most analogous to a wireless communication facility, as defined by Art. II, Sec. II-B (14)(g) of the Unified Zoning Code.**
 - d) **The interpretation made by Kurt Schroeder was supported by the language and definitions contained in the Unified Zoning Code.**
- 3. **The Board further finds that the interpretation of the Zoning Administrator, as set forth in his letter on October 29, 2002 was reasonable and is supported by evidence presented at this hearing.**
 - 4. **The Board further finds that the appellant has not met its burden of proof to show that the interpretation was in error.**

THEREFORE, BASED UPON THE FOREGOING, I MOVE THAT THE INTERPRETATION OF THE ZONING ADMINISTRATOR HEREIN BE AFFIRMED.

FOSTER: As an added note it does not include reference to the Building Code we are talking about the Zoning Code.

RUANE: Discussion of the motion. I am in favor of the motion, because it is my opinion that this is most analogous to a support structure as that term is utilized in the Wireless Communication Plan and other assorted policies followed by the City. Any other comments? Call the questions then.

MOTION carries to Affirm 5-0-1. Phillips abstains.

RUANE: J.R. do you have a report for this meeting.

J. R. COX: No report for this meeting.

MEETING adjourned 3:30 p.m.